

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 10, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2014AP1090-CR

Cir. Ct. No. 2007CF166

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MAURICE J. CORBINE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sawyer County: JOHN P. ANDERSON, Judge. *Reversed and cause remanded.*

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Maurice Corbine, pro se, appeals a judgment convicting him of OWI and operating after revocation charges, and an order denying his postconviction motion alleging ineffective assistance of counsel. Corbine asserts his trial counsel was required to more thoroughly investigate a

jailhouse video before counsel could make a reasonable strategic decision concerning the DVD recording's value to the defense. We agree. Accordingly, we reverse and remand.

BACKGROUND

¶2 This is the second time this appeal has come before us. The first time, we reversed and remanded because the trial court erroneously denied Corbine's postconviction motion without conducting a *Machner*¹ hearing "with respect to his attorney's failure to obtain and review the DVD." *State v. Corbine*, No. 2013AP648, unpublished slip op. ¶2 (WI App Nov. 5, 2013).

¶3 The underlying facts are set forth in greater detail in our prior decision; we summarize them here. Lac Courte Oreilles tribal police officer Twylia Dailey observed an oncoming SUV speeding. She turned and followed the SUV, which entered a bar parking lot. All three occupants of the SUV exited after it stopped.

¶4 Dailey reported she saw Corbine exit the driver's door. She observed evidence of intoxication and transported him to the Sawyer County jail for field sobriety tests. Dailey's report indicated that upon arrival at the jail, she inserted a DVD into a video recorder to record the encounter. Corbine performed some sobriety tests, but refused a PBT. After Dailey cited him for OWI, Corbine refused to submit to a breath test. Dailey then instructed the booking officer to place Corbine in shackles and a belly chain for transport to a hospital for an involuntary blood draw. At that point, the report indicates Corbine became more

¹ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

antagonistic, twice used the word “shit,” and repeated earlier requests to have his attorney present. The report indicates Dailey subsequently returned to the jail and retrieved the DVD from the recorder, and it was “logged, tagged and secured into evidence.”

¶5 At trial, the defense conceded Corbine was intoxicated when arrested. Dailey testified she saw Corbine exit the vehicle’s driver door. She also stated she was with him for two-and-one-half hours and he never asserted he was not the driver. In contrast, Corbine and his cousin, Rodney Corbine, both testified that Rodney had been driving and that Dailey arrived in the parking lot about ten to fifteen seconds after they stopped and exited. Rodney explained he exited the vehicle and reentered on the passenger side because he did not have a driver’s license. Corbine testified he told Dailey during the stop that he was not the driver. However, he was not asked whether he repeated this claim at the jail.

¶6 The jury found Corbine guilty. He moved, pro se, for postconviction relief, arguing his trial attorney was ineffective by failing to obtain and review a DVD of Corbine performing field sobriety tests at the jail. Corbine claimed the DVD would have shown that he told Dailey he was not the driver, which would have impeached Dailey’s trial testimony and damaged her credibility, prompting the jury to acquit him. The State represented that the DVD could not be found, and suggested it never existed in the first place. The trial court denied Corbine’s motion without holding a *Machner* hearing.

¶7 Corbine appealed, pro se, renewing his argument that trial counsel should have investigated the video more thoroughly. We explained:

In his postconviction motion, Corbine alleged: (1) counsel was aware that a DVD of the field sobriety tests existed; (2) counsel was aware that Corbine told Dailey he was not

the driver during the field sobriety tests; (3) counsel failed to obtain and review the DVD; and (4) had counsel obtained the DVD and introduced it into evidence at trial, it would have impeached Dailey's testimony that Corbine never told her he was not the driver, which would have damaged Dailey's credibility. We conclude these allegations, if true, are sufficient to entitle Corbine to relief.

Id., ¶17.

¶8 We first rejected the State's assertion that no DVD ever existed. Next, we addressed the State's argument that trial counsel made a reasonable strategic decision that playing the DVD at trial would do more harm to Corbine's case than good. We observed:

In [a] letter attached to Corbine's postconviction motion, counsel explained [to Corbine] that, based on the description of the video he received from an unnamed source, he determined "any value to your case was substantially outweighed by the fact that [the video] would contain a heated conversation with the arresting officer, as well as you taking and failing sobriety tests and being intoxicated." Counsel stated, "In retrospect, while your statement to the officer that you were not the driver might have been consistent with your trial testimony, the harm to your case of playing it to the jury and showing them the potentially negative footage would have done far more harm than good."

Id., ¶21.

¶9 We rejected the State's strategic-decision argument because trial counsel never viewed the DVD. We explained:

The problem with counsel's explanation is that he never personally viewed the DVD. Instead, he relied on a description of the DVD provided by an unnamed source. Without knowing who that person was, or why counsel believed that person's description was reliable, we cannot conclude counsel's strategic decision that the DVD would do more harm to Corbine's case than good was reasonable. ... A *Machner* hearing was therefore necessary for counsel to explain his reasoning.

Id., ¶22. We similarly rejected the State’s suggestion that trial counsel fulfilled his duty simply by requesting the DVD, and after police indicated the DVD could not be found, he did not have any obligation to take further action. We explained:

Knowing that a DVD had been created and apparently viewed by another, counsel should have taken further steps to investigate the DVD’s whereabouts. The letter from Corbine’s attorney does not indicate what action he took, if any, after he learned police could not find the DVD. Had the [trial] court held a *Machner* hearing, counsel could have explained whether he took any further action regarding the DVD, or why he chose not to do so.

Id., ¶24.

¶10 Finally, we rejected the State’s argument that counsel’s performance was not prejudicial. We reasoned:

This case hinged on the jury’s assessment of the witnesses’ credibility. ... [I]f the jury had seen the DVD evidence disproving Dailey’s testimony that Corbine never told her he was not the driver of the [SUV], Dailey’s credibility would likely have been damaged. Because the witnesses’ credibility was key in this case, it is reasonably probable that admission of the DVD would have affected the outcome.

Id., ¶27. Accordingly, we reversed and remanded for the trial court to conduct a *Machner* hearing. *Id.*, ¶30.

¶11 At the *Machner* hearing, Corbine was represented by counsel, who questioned Corbine’s trial counsel, Michael Hoffman. Hoffman essentially confirmed everything Corbine had alleged in his postconviction motion. When asked about seeking the DVD, Hoffman explained he sent a letter to the tribal police requesting a copy. After explaining he did not receive it, Hoffman testified as follows:

A. [M]y recollection was that I had telephone conversations with them. And the last conversation that I had essentially said that they didn't have anything to give me or that it was lost. I don't recall what exactly they said, but they never sent me anything.

Q. And do you remember who you talked to? ...

A. I don't recall that. It was—I think it was just a secretary.

Q. What, if anything, did you do to try to obtain it after you were told by whoever told you that they couldn't find it?

A. I—nothing at that point.

Q. Did you consider filing a motion to secure it or motion to compel it?

A. No, I didn't.

Q. Did you consider filing any **Brady** motions relative to it?

A. Honestly, no, I didn't.

¶12 Hoffman was then asked about the letter attached to Corbine's postconviction motion wherein Hoffman asserted he spoke to someone who had viewed the DVD. Hoffman testified:

My recollection was that I had some sort of conversation with somebody about this DVD. ... I was appointed to this case, I believe, in May of 2010. ... And my recollection was that sometime in 2010 I had a conversation with somebody and there was a discussion about the DVD. My recollection was that the contents were similar to what—or at least the same or something along those lines to what was contained in [officer] Dailey's report.

The following discussion ensued:

Q. Okay. As a result of this conversation, did you get information as to whether or not Mr. Corbine was heard to say on the DVD that he was not the driver?

A. No, I don't recall that. I mean, I guess I'm not going to say no. I think my answer really is I just don't recall.

Q. Okay. Do you remember who you had this conversation with that viewed the DVD?

A. I—I don't. I can speculate as to who I think I talked to, but I don't recall exactly who I—who I talked to.

Q. Okay. You'd agree then that without being able to say who it was, you can't really say—testify that the description would be reliable then, correct?

A. No. I mean, no, I'm not going to qualify that. No, I can't state with any reliability as, you know, if I can't remember who I spoke to[,] what the contents of that conversation was[,] probably is not very reliable.

¶13 Finally, Hoffman testified regarding his belief the DVD would be unhelpful to Corbine's case. He explained that "if it was substantially similar to what Ms. Dailey's report said, ... I didn't think it was going to be helpful." Hoffman's primary concern was that it would have been harmful if the jury saw Corbine intoxicated. Additionally, on cross-examination, Hoffman testified:

Again, this is purely just reading the police report. And then it sounded as though, if the tape existed, that the end of their interaction in which she is requesting that he—or that there's going to be a blood draw ... that it sounded like if the DVD existed, it would have been a very heated conversation because according to Ms. Dailey ... he is swearing at her. ... [M]y assumption is that conversation was agitated.

¶14 The trial court denied Corbine's motion. It determined Hoffman engaged a reasonable strategy when not following up about the DVD because this prevented the jury from seeing Corbine intoxicated, aggressive, and using profanity. The court also determined there was no prejudice from not having the DVD, in part because the evidence would have been cumulative. Further, the court explained:

How much harm to the credibility would it have done is speculative. It's not clear that that credibility would be so harmed that as a matter of law it would have just created reasonable doubt. The Court can't make ... that assumption. ... I don't see clear bias or prejudice because it didn't change the story or the defense. It might have had an impact on credibility, but to what extent is unclear.

Corbine appeals.

DISCUSSION

¶15 Corbine argues Hoffman was ineffective for failing to obtain or further investigate the jailhouse DVD recording. Whether counsel rendered ineffective assistance is a mixed question of fact and law. *State v. Nielsen*, 2001 WI App 192, ¶14, 247 Wis. 2d 466, 634 N.W.2d 325. We uphold the circuit court's findings of fact unless they are clearly erroneous. *Id.* However, whether the defendant's proof is sufficient to establish each prong of ineffective assistance is a question of law that we review independently. *Id.*

¶16 To prevail on an ineffective assistance claim, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must point to specific acts or omissions by counsel that are "outside the wide range of professionally competent assistance." *Id.* at 690. Counsel's "strategic choices made after thorough investigation of [the] law and facts relevant to plausible options are virtually unchallengeable[.]" *Id.* However, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. To demonstrate prejudice, the defendant must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable

probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694.

¶17 We need not say much in this appeal. In Corbine’s first appeal, we determined that the allegations of Corbine’s postconviction motion, if true, were sufficient to entitle him to relief. On remand, the allegations were borne out.²

¶18 Hoffman acknowledged he did not know the identity of the person who had allegedly viewed the video and therefore had no basis on which to determine whether that person was reliable. He also explained that the unknown person merely confirmed that the video was largely consistent with officer Dailey’s notes, and he did not recall being told whether Corbine had denied being the driver. Further, Hoffman testified that his belief that the video portrayed Corbine in a poor light was based upon his review of the police report—not from something the unidentified person may have said. Finally, Hoffman testified he took no further steps to locate the DVD after he was told it was missing, and he never considered taking further action such as filing a motion. Accordingly, Corbine’s uninformed trial strategy was unreasonable and constituted deficient performance. *See id.* at 691.

² When an appellate court decides a legal issue, that decision

establishes the “law of the case,” and must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, unless the evidence on a subsequent trial was substantially different, [or] controlling authority has since made a contrary decision of the law applicable to such issues.

See State v. Brady, 130 Wis. 2d 443, 448, 388 N.W.2d 151 (1986) (source omitted).

¶19 We also determined in our first decision that, if Hoffman performed deficiently, Corbine was prejudiced thereby. Not only did Hoffman not adequately investigate the DVD, he failed to ask Corbine at trial whether he denied driving while at the jail or question Dailey regarding the DVD. A jury would undoubtedly view whether Corbine denied driving the day of his arrest as highly relevant to the credibility of the defense theory.

¶20 The trial court applied an improper standard on remand; the beyond-a-reasonable-doubt standard has no place in the ineffective assistance inquiry. We are satisfied there is “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *See id.* at 694. Accordingly, Corbine is entitled to a new trial.

By the Court.—Judgment and order reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

